KOSMA PALM OIL MILL SDN BHD & ORS

v.

KOPERASI SERBAUSAHA MAKMUR BHD

COURT OF APPEAL, KUALA LUMPUR
MOHD NOOR AHMAD JCA
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: C-02-247-2002]
6 NOVEMBER 2003

CIVIL PROCEDURE: *Injunction - Interim injunction - Appeal against refusal to grant - Bona fide serious issue to be tried, whether any - Balance of justice or convenience - Status quo - Full and frank disclosure*

This was an appeal from the decision of the High Court dismissing the plaintiffs' *inter partes* application for an interim injunction to restrain the defendant from trespassing onto certain properties. In dismissing the application, the High Court held that: (i) the grant of an injunction is discretionary; (ii) the balance of convenience favoured the defendant; (iii) damages would be an adequate remedy for the plaintiffs; (iv) the *status quo* – before the plaintiffs entered into the agreements for the purchase of the palm oil factory and estate from the defendant – should be maintained; and (v) there was material non-disclosure of relevant facts on the part of the plaintiffs when they applied for and obtained the *ex parte* interim injunction against the defendant.

Held (dismissing the appeal):
Per Richard Malanjum JCA

[1] It was not in dispute that the defendant was/is the owner of the properties concerned. As such, it would not be unlawful for the defendant to regain possession of the properties, and the question of the defendant being a trespasser did not arise. There was, therefore, no '*bona fide* serious issue to be tried' in this respect, and the plaintiffs' appeal should, on this ground alone, be dismissed. (pp 246 b-c & 247 a)

[1a] Section 7 of the Specific Relief Act 1950 was of no help to the plaintiffs. There was no evidence to show how the plaintiffs came into possession of the said properties. (p 247 b)

[2] The balance of convenience or the justice of the case was not in favour of the plaintiffs having possession of the properties. The defendant was/ is the rightful owner of the properties and should not be dispossessed of them. (p 247 c-f)

[3] The plaintiffs' action for 'trespass and inducement to breach of contract' presupposed that they were in lawful possession of the properties to the exclusion of the defendant and all others. However, the facts concerning the terms and the subsequent termination of the agreements (for the purchase of the properties from the defendant) were not disclosed in the plaintiffs' *ex parte* application for the interim injunction. There must always be full and fair disclosure in an *ex parte* application. (pp 248 g-h & 249 a-b)

[Appeal dismissed; Erinford injunction also set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan *inter partes* plaintif untuk injunksi interim bagi menahan defendan dari mencerobohi suatu hartanah. Dalam menolak permohonan, Mahkamah Tinggi memutuskan bahawa: (i) pemberian injunksi adalah bersifat budibicara; (ii) imbangan keselesaan menyebelahi defendan; (iii) gantirugi merupakan remedi yang memadai untuk plaintif; (iv) *status quo* – sebelum plaintif memeterai perjanjian bagi membeli kilang dan ladang kelapa sawit dari defendan – harus dikekalkan; dan (v) terdapat ketakdedahan material berkaitan fakta-fakta relevan di pihak plaintif sewaktu mereka memohon untuk mendapatkan dan memperolehi injunksi interim *ex parte* terhadap defendan.

Diputuskan (menolak rayuan):
Oleh Richard Malanjum HMR

[1] Tidak dinafikan bahawa defendan adalah pemilik hartanah berkenaan. Oleh itu, ianya tidak menjadi kesalahan bagi defendan untuk mengambil semula milikan hartanah, dan soal defendan menjadi penceroboh adalah tidak berbangkit. Dengan itu juga, tidak wujud 'isu *bona fide* yang perlu dibicarakan' berkaitannya, dan rayuan plaintif, atas alasan ini sahaja, harus ditolak.

[1a] Seksyen 7 Akta Relif Spesifik 1950 tidak membantu plaintif. Tiada keterangan yang menunjukkan bagaimana plaintif memperoleh milikan hartanah-hartanah berkenaan.

[2] Imbangan keselesaan atau keadilan kes tidak berpihak kepada plaintif mendapat milikan hartanah-hartanah. Defendan adalah pemilik sah bagi hartanah dan milikannya itu tidak harus dilucutkan.

[3] Tindakan plaintif bagi 'pencerobohan dan mendorong pelanggaran kontrak' mengandaikan bahawa hanya mereka sahaja yang mempunyai milikan sah terhadap hartanah dan tidak defendan dan lain-lain orang. Bagaimanapun, fakta berkaitan terma-terma perjanjian serta penamatannya selepas itu (bagi pembelian hartanah dari defendan) tidak didedahkan dalam permohonan *ex parte* plaintif bagi injunksi interim. Dalam sesuatu permohonan *ex parte* harus sentiasa wujud pendedahan yang penuh dan adil.

Rayuan ditolak; injunksi Erinford juga diketepikan.]

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(foll)***

Hong Huat Enterprise Sdn Bhd v. Golden Vale Golf Range & Country Club Sdn Bhd [2001] 1 CLJ 181 CA ***(refd)***

Hotel Continental Sdn Bhd v. Cheong Fatt Tze Mansion Sdn Bhd [2002] 3 CLJ 653 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(foll)***

Lim Sung Huak & Ors v. Sykt Pemaju Tanah Tikam Batu Sdn Bhd [1994] 1 CLJ 265 HC ***(refd)***

Siporex Trade SA v. Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 29 r. 1(2A)
Specific Relief Act 1950, ss. 7, 8

For the appellant - David Morais (Jacob Goldie); M/s Zaid Ibrahim & Co
For the respondent - Muhamed Ariff Mahindar Abdullah (Sahadin Mohd Taib); M/s Sahadin & Co

[Appeal from High Court, Temerloh; Civil Suit No: 22-29-2001]

Reported by Gan Peng Chiang

JUDGMENT

Richard Malanjum JCA:

Introduction

On 12 May 2003 we dismissed with costs the appeal by the appellants against the decision of the High Court in Temerloh on 2 April 2002 refusing to grant an interim injunction as prayed for in encl. 12 thereof.

And with the dismissal of the appeal the Erinford Order issued by the same High Court to the appellants on 26 April 2002 was therefore *ipso facto* set aside.

Dissatisfied with our decision the appellants have now applied for leave to appeal to the Federal Court. We now give our reasons for dismissing the appeal.

Background

The following are not in dispute:

(a) that the respondent is a co-operative society registered under the Co-Operative Societies Act 1993;

(b) that there were three agreements executed by the respondent as the seller with the respective appellants as buyers in connection with the sale of the palm oil mill factory and the estate lands ('the properties');

(c) that all the agreements were dated on 20 November 1998 but was agreed to be effective from 1 January 1998;

(d) that it was pursuant to its corporatization exercise that the respondent executed the agreements with the view of listing with the Kuala Lumpur Stock Exchange the shares of the companies involved;

(e) that on 26 September 2001 the appellants obtained an *ex parte* injunction to restrain the respondent from trespassing onto the properties; such move was taken due to the action of the respondent asserting its ownership and possession of the properties which it maintained were never given to the appellants under the agreements; subsequently, by consent on 15 October 2001 an interim injunction was granted pending the disposal of encl. 12;

(f) that the *inter partes* application for injunction (encl. 12) was heard and subsequently dismissed on 2 April 2002; the appellants appealed against that dismissal;

(g) that upon the dismissal the appellants and the respondent were at variance with regards to the status of the properties which led the appellants to seek for an Erinford injunction and which was granted on 26 April 2002 pending the disposal of their appeal to this court. An appeal was also filed by the respondent against the granting of the Erinford injunction.

In The High Court

In dismissing the application of the appellants the learned High Court judge, *inter alia*, ruled:

(i) that the application involved the exercise of discretion;

(ii) that the balance of convenience tilted in favour of the respondent;

(iii) that damages would be an adequate remedy for the appellants;

(iv) that *status quo* before the agreements should be maintained; and

(v) that there was material non-disclosure of relevant facts by the appellant during the *ex parte* application.

The Appeal

Before us learned counsel for the appellants submitted:

(i) that there are serious issues to be tried such as whether the respondent can take possession of the properties summarily without order of court and whether the respondent committed the tort of inducement of breach of contract by forbidding employees of the appellants to attend managers' meeting when called;

(ii) that the balance of convenience tilts in favour of the appellants since an injunction will prevent the respondent by way of self-help from dispossessing the appellants and there are also interests of third parties to consider;

(iii) that damages are not adequate in that the injunction sought for is to prevent interference by the respondent of the possession by the appellants of the properties; moreover any interference on their possession would result in irreparable harm to their business and reputation in addition to rights of third parties being affected including their livelihood;

(iv) that there was no material non-disclosure at the *ex parte* application since the facts referred to by the learned judge was irrelevant to the present causes of action of the appellants;

(v) that the learned judge erred in making finding of facts instead of just identifying them;

(vi) that the learned judge erred in holding that the *status quo* to be maintained was not from the possession by the appellants but before the signing of the agreements; and

(vii) that the respondent proceeded on self-help contrary to the object and spirit of ss. 7 and 8 of the Specific Relief Act 1950 ('the Act').

Finding

The law on the grant or refusal of an interim injunction is clear. It involves the exercise of discretion. And there are judicial decisions, local and foreign, providing guidelines for courts to take into account when considering applications for injunction.

In *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 this court has summarised the guidelines in this way:

> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
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> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

> (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan.* It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion. per Gopal Sri Ram at pp. 305-306.

(See also: *Hotel Continental Sdn Bhd v. Cheong Fatt Tze Mansion Sdn Bhd* [2002] 3 CLJ 653).

Now from the undisputed facts it is clear that the question of possession of the properties is in issue. The appellants maintained that they were in possession since January 1998 and stating that such possession was lawfully obtained.

The respondent contended otherwise since the agreements did not give any permission for the appellants to take possession. And that it was in possession if not for the Erinford injunction.

Having considered the opposing contentions it is our view that the issue of possession should be considered *vis-a-vis* ownership of the properties. In this case there was no evidence adduced by the appellants to show that indeed they came into possession of the properties pursuant to an arrangement with the respondent. And we noted that before us there was no assertion by the appellants that they were the legal and beneficial owner of the properties. And rightly so since if it was based on the agreements then the law on the point is clear.

In *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd.* [1996] 2 CLJ 561 his Lordship Edgar Joseph Jr. FCJ said at p. 581:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

> In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in Ahmad bin Salleh, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.

Meanwhile there is no dispute that the properties belong to the respondent. As such there is nothing unlawful for the respondent being the owner of the properties to regain possession of the same. Thus the question of it being a trespasser on its own properties should not arise. If at all there is a trespasser it would appear to be the appellants bearing in mind that there was nothing in the first place shown to indicate the manner in which they gained possession as alleged.

In *Hong Huat Enterprise Sdn Bhd v. Golden Vale Golf Range & Country Club Sdn Bhd* [2001] 1 CLJ 181 quite a similar situation confronted this court in respect of interest of a registered owner as against a purchaser in an application for injunction. And this is what this court said:

> Perhaps the real issue before us is the determination of the appellant's status as to its continued occupation of the land. The appellant cannot be heard to say that it derived an interest in the land following the granting of the licence to mine the land under the first agreement as on its own admission it had accepted that first agreement to be invalid and unenforceable. In this respect, the respondent had tendered a statutory declaration affirmed by a director of Jaytra on 27 February 1998, stating that when the first agreement was executed, the appellant was fully aware that Jaytra had no legal capacity to enter into the agreement but nonetheless the appellant took the risk that the first agreement may be invalidated as it wanted to obtain a sand mining licence from the relevant authority.
>
> The appellant however had not responded to this statutory declaration.
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> Clearly between October 1991 until the date of the third agreement on 10 June 1993, the appellant had no right to be on the land and during that period it was a trespasser. However, the appellant's right to be on the land after that is regularized by the third agreement, and the appellant can only rely on the provisions of the third agreement to support its claim that it has an equitable interest over the land.
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> For starters I need to point out that the appellant did not acquire any proprietory or beneficial interest over any part of the land despite the third agreement being a sale and purchase agreement and despite the appellant fulfilling its obligations by tendering the purchase price in full as no part of the land was transferred to the appellant. per Siti Norma Yaakob JCA (as she then was).

Accordingly, with respect we do not think the first issue raised by the appellants should merit further matured argument. Hence on this first hurdle itself the appeal of the appellants should fail.

The appellants relied on s. 7 of the Act to substantiate their contention and urged this court to give it the widest interpretation possible to cover all persons in possession of immovable properties and not to confine to tenancy.

Having heard the argument advanced we were not convinced that s. 7 should be applied in this case. As stated earlier there was nothing to show that the appellants came into possession of the properties on the basis of any documentary evidence let alone as a licensee.

As for the second issue its relevance depends on the finding on the first issue. It would make no sense to consider it when the appellants are not in possession of the properties. And in view of our conclusion on the first issue it is now plainly academic to consider this second issue for the purpose of this appeal.

On the issue of balance of convenience in our judgment it was correctly found to be in favour of the respondent. Justice of the case does not lie in allowing the appellants to be in possession of the properties as they belong to the respondent. To do so would tantamount to allowing the appellants to deprive the lawful owner of its properties.

No doubt it was the stand of the appellants that they were in possession of the properties since 1998 until dispossessed by the respondent. However, as discussed above each party had its own version on the issue of possession. But it is clear that the appellants failed to show how in the first place they came to possession of the properties while there was no dispute that they belong to the respondent. Thus the contention that it would be more convenient to allow the appellants to continue control of the properties has no merit.

In respect of the argument that there would be breach of the peace if the respondent was allowed to go on self-help, no evidence to that effect was adduced. In fact there was no denial that the respondent was in possession of the properties before the granting of the Erinford injunction. This reason has no basis as well.

Another matter that should be taken into account is the fact that the necessary approvals from the relevant authorities such as the Jawatankuasa Pembangunan Koperasi (JPK) and Jawatankuasa Pelaburan Asing (FIC) were not secured. Surely the absence of such approvals would no longer make the continuation of the agreements possible, hence another factor to weigh against the granting of the interim injunction applied for.

On the issue of adequacy of damages it was submitted for the appellants that irreparable harm would be suffered by the appellants in terms of their business and reputation due disruption of their use of the properties. In addition there would also be irreparable harm to the livelihood of the employees of the appellants if the respondent were to take over possession of the properties.

It was further contended that the learned judge erred in holding that as there was a prayer for damages in the claim it could be assumed that damages would be adequate.

With respect we are also not with the appellants on this issue. It is not a case of where losses of the appellants, if they were to succeed in this action for trespass and inducement to breach of contract, could not be quantified in terms of monetary sums.

In any event, with the appellants failing to adduce evidence as to their right to be in possession of the properties, the issue of trespass by the owner should not arise.

We noted that learned counsel for the appellants only highlighted the alleged harms that could come about if the trespass of the respondent was not abated. No submission was made on the second cause of action in relation to this issue.

There was also the complaint of learned counsel for the appellants that the learned trial judge erred on the issue of maintaining the *status quo*.

Now, as it is our findings on the other issues, particularly that the balance of convenience tilts in favour of the respondent, the question of maintaining the *status quo* should no longer arise. Hence, the finding of the learned High Court judge on the issue is therefore quite irrelevant. But on the facts of this case we think the learned High Court judge was not completely wrong when he came to such finding. After all the appellants failed to show how they came into possession of the said properties.

On the issue of material non-disclosure of relevant facts at the *ex parte* application, it was the stand of learned counsel for the appellants that the agreements, their compliance of the terms and their termination were independent of the action of the appellants for trespass and inducement to breach of contract. Thus the issue was irrelevant and it was therefore wrong for the learned judge to rule that such failure was fatal to the case of the appellants.

With respect, we are unable to agree to such contention. The cause of action for trespass presupposed that the appellants were lawfully in possession of the properties to the exclusion of others. But to take that stand would tantamount to ignoring the true position of the genesis of the relationship of the parties.

Indeed the fact that the agreements were terminated, validly or otherwise, was obvious to be one of the defences that could be raised by the respondent in response to the action for trespass. Further O. 29 r. 1(2A) of the Rules of the High Court 1980 mandates such requirement. We find therefore no merit in the contention of the appellants on this point.

It is trite law that in any *ex parte* application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant. In *Siporex Trade SA v. Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 his Lordship Bingham J (as he then was) said this at p. 437:

Failure to make full and fair disclosure

> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. Most of these principles are established by authorities such as *Rex v. The Kensington Income Tax Commissioners* [1917] 1 KB 486; *Thermax Ltd v. Schott Industrial Glass Ltd* [1981] FSR 289; *Wardle Fabrics Ltd v. G Myristis Ltd* [1984] FSR 263; *BankMellat v. Nikpour* [1985] FSR 87. The other principles have not been the subject of detailed challenge.

(See also: *Lim Sung Huak & Ors v. Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1994] 1 CLJ 265 where KC Vohrah J (as he then was) made reference to the forgoing case).

For the above reasons that we dismissed the appeal with costs. We also declined to accede to the oral request by the respondent for an order of possession thereafter as we were of the view that such matter should be dealt with by the High Court.